FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE SUPREME COURT OF GEORGIA.

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Appellants,

v.

CITY OF DECATUR,
Appellee.

No. 625
October Term,
1935.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE SUPREME COURT OF GEORGIA.

In accordance with Rule Seven (3) of the Supreme Court of the United States, appellants file this brief in opposition to the motion of the Appellee.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

First: That the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29th, 1935.

Where such an issue is raised, the Supreme Court of the United States not only has jurisdiction, but it alone can determine and settle the question.

In the decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, the Court said:

> "May we suggest that if we are wrong in our construction of the case, our judgment herein is open to further review and correction by the Supreme Court of the United States."

The dissenting opinion in said case stated:

> "The case having been reversed by the Supreme Court of the United States, the appropriate procedure, in my opinion, would be to make the judgment of that Court, the judgment of this Court."

The decisions of the Supreme Court of the United States, cited and relied upon by Appellee, show that this Court in each instance granted a second appeal (or second certiorari or second writ of error) so that it could after argument and a full and complete hearing determine for itself whether the subsequent proceedings in the State court were in conformity with its opinion and mandate.

For instance:

In *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129, 134, a second appeal was allowed by this court and the court held that those matters which were actually considered and decided by this court were foreclosed.

In *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, a second appeal, or certiorari, was granted. In that case the court held:

> "Hence, the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of

any other than the question discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case."

In *Schneider Granite Co. v. Gast Realty & Investment Co.*, 245 U. S. 288, a second appeal was granted by this court so that this court could determine whether the State court had followed the opinion and mandate rendered by it when the case was first before it on appeal.

In *Wolff Packing Co. v. Court of Industrial Relations (Kans.)*, 267 U. S. 552, a second appeal was allowed. The court held: "judgment of reversal is not necessarily an adjudication by the appellate court of any other than the question in terms discussed and decided." The questions which were discussed and decided in the opinion rendered by the Supreme Court of the United States were conclusive.

In *Clark v. Willard*, 292 U. S. 112, the Supreme Court of the United States held that it took jurisdiction of the case and in reversing the decision of the State court remanded it to the State court with direction to determine certain questions. (See page 129 of said decision.) This case was again before the Supreme Court of the United States on writ of certiorari. (*Clark v. Willard*, 294 U. S. 211).

In the case at bar the Supreme Court of the United States did not refer the case back to the State court for a reconstruction by it of the Georgia statutes in question. In its decision this court recognized and stated the principle of law that it accepted the construction placed upon said statutes by the Supreme Court of the State of Georgia. It then expressly held what said construction was and said decision became the law of the case.

The opinion, judgment, decree and mandate of the Supreme Court of the United States, which it issued to the lower court, is the judgment of the court irrespective of the fact that there may be a dissent by members of the court.

The decision rendered by the majority is as effective as if all of the Judges had concurred therein.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

The direction to proceed consistently with an opinion of the court has the affect of making the opinion a part of the mandate, as though it had been therein set out at length.

Metropolitan Co. v. Kaw Valley Drainage Dist., 225 U. S. 519, 523.

Gulf Refining Co. v. United States, 269 U. S. 125, 135.

No question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case.

In Re Sanford Fork & Tool Co., 160 U. S. 247, 259. (See cases there cited.)

See also:

Washington Bridge Co. v. Stewart, 3 How. 413, 425.

Durant v. Essex Company, 101 U. S. 555,556.

This court only has jurisdiction over a final decision of a State court.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;

Haseltine v. Central Bank, 183 U. S. 130;

Schlosser v. Hemphill, 198 U. S. 173, 175;

Norfolk Turnpike Co. v. Oyster Comm'n, 226 U. S. 99, 101;

Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437;

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 136.

When upon appeal from such decision, this court holds that the State court construed State statutes in a certain way, its decision with reference to that question is final and will not be altered, changed or reversed by this court after the term in which its said decision has been rendered.

Seabold v. United States, 12 Peters, 488, 492;

Schell v. Dodge, 107 U. S. 629.

To give the Supreme Court of Georgia the power to review said decision of the Supreme Court of the United States and hold that the Supreme Court of the United States had erred, would give the State court greater power and jurisdiction over the decisions of this court than this court itself will exercise.

The appeal raising these questions comes within the exclusive jurisdiction of this court. We respectfully submit that the appeal should not be dismissed nor the opinion of the Supreme Court of Georgia be affirmed without affording appellants a full hearing on the questions involved.

The mandate of the United States Supreme Court directed a judgment of reversal by the Supreme Court of the State of Georgia. The Georgia Supreme Court had no power or authority, on the same record, to render a judgment of affirmance.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

The judgment of the United States Supreme Court was a judgment reversing the judgment of the Supreme Court of Georgia and the mandate directed that Court to reverse

its former judgment. The Georgia Supreme Court did not accept a reversal in accordance with the judgment of this Court, but it in effect granted a rehearing and reversed not its own judgment, but the judgment of the Supreme Court of the United States.

We respectfully submit that the motion to dismiss the appeal or affirm the decision of the Supreme Court of Georgia upon the ground that they have followed the mandate of this Court is without merit:

> **Second: The decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, denied appellants the right to introduce evidence on material issues in the cause and denied them the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question.**

Appellants claim that such denial was and is in contravention of the due process clause of the Federal Constitution. This raises a Federal question for consideration and determination by this court.

> *Georgia Rwy. & Elec. Co. v. City of Decatur*, 295 U. S. 165.
>
> *Saunders v. Shaw*, 244 U. S. 317, 319.

The decision of the Supreme Court of Georgia that as the Company (appellants) "stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it is therefore too late for such company to avoid payment on the ground that enforcement of the assessment therefor will deprive the company of its property, in violation of the due process clauses of the State and Federal Constitutions," was erroneous:

(a) It was not in accord with the mandate issued by the Supreme Court of the United States.

In *Georgia Railway & Electric Company v. Decatur*, 295 U. S. 165, this court held that the refusal of the State court to permit appellants to introduce evidence was in contravention of the due process of law clause of the Federal Constitution, and reversed the judgment of the Supreme Court of Georgia. Again disallowing appellants the right to introduce evidence, and upon the same record, the Supreme Court of Georgia renders a judgment of affirmance, and not one of reversal, as directed by this court. Such judgment was erroneous for it was not in accordance with the opinion, decision and mandate of this court.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

(b) There were no pleadings or evidence in the case to show or sustain the decision of the Supreme Court of Georgia on the theory of an estoppel.

Appellants' evidence which this court held the State Court erred in rejecting, would have affirmatively shown that appellants were not estopped from establishing the fact that its property would be confiscated in violation of the due process clause of the Federal Constitution.

To deny appellants the right to introduce evidence establishing such fact is a denial of due process of law.

Saunders v. Shaw, 244 U. S. 317;

Georgia Rwy. & Elec. Co. v. Decatur, 295 U. S. 165.

(c) Appellants were denied the only remedy, course or procedure allowed or permitted it under the special assessment statutes in question.

This fact is shown by the former litigation between the parties in the case at bar.

When the City of Decatur was about to pave the street under the special paving assessment statutes in question, appellants notified the City of Decatur that it would and could receive no benefit from the paving and that therefore no legal or valid assessment could be made against appellants. Appellants offered and tendered to the City of Decatur its street railway franchises and property located within the municipality. By resolution, the City of Decatur refused the tender and brought a suit in the Superior Court of DeKalb County to compel appellants to continue street railway operation within the municipality. In answer to said suit appellants pleaded and contended:

First: That its municipal franchise to operate in Decatur had expired.

Second: Appellants also pleaded the contentions and defenses which they set up in the case at bar.

With reference to this second defense of appellants, the City of Decatur successfully contended that such questions could not be raised until after the paving had been completed and assessment execution issued and the municipality undertook to enforce and collect it.

The decision of the Supreme Court of Georgia in said case is reported in *Georgia Power Co. v. City of Decatur*, 168 Ga. 705. We set out the following extracts (Pages 12, 13, and 15) from the brief of the City of Decatur filed in the Supreme Court of Georgia in said case:

"It (appellants) sets up the contentions that the paving is no benefit, and that, therefore, the defendants

ought not to pay it. The law which authorizes these paving charges provides, for such an issue as that, a defense by affidavit of illegality, and it is elementary law that in such cases the defense must be presented that way and no other.

"The law under which this assessment is made will be found in the Acts of 1919, page 934. It provides for defense by way of affidavit of illegality. Among the decisions applicable generally to such defenses may be mentioned:

Hart v. Lagaron, 46 Ga. 396;

Ansley v. Glendenning, 56 Ga. 286;

Russell v. O'Dowd, 48 Ga. 475 (3);

Hitchcock v. Culver, 107 Ga. 184 (2);

Park v. Callaway, 128 Ga. 119 (4);

Rooney v. McCall, 128 Ga. 249 (2);

Matthews v. Gelders, 129 Ga. 103 (2);

Williams v. Kennedy, 134 Ga. 339 (1);

Smith v. Murphy, 140 Ga. 80;

Daniel v. Rosenheim, 152 Ga. 278 (2).

"Cases in which the principle has been applied especially where street improvements were involved will be found as follows:

Regenstein v. Atlanta, 98 Ga. 170;

Gainesville v. Dean, 124 Ga. 750;

Rice v. Macon, 117 Ga. 401.

"Other like instances are:

Lanham v. Rome, 136 Ga. 398;

Waycross v. Cowart, 164 Ga. 721;

Cotton Mill v. Social Circle, 163 Ga. 465.

"* * It can be and should be made the subject of separate litigation, and the only way to do this is by affidavit of illegality.* * * *

> "But if defendants desire to set up its illegality and escape paying it (the special assessment) they must do that in a separate case and by affidavit of illegality and not otherwise."

In appellants' second ground of their statement of the jurisdiction of the Supreme Court of the United States, the provisions of the Acts in question are set out and discussed and what is there said need not be repeated here.

The right of a property owner to challenge his liability for the assessment either in whole or in part, given the property owner by affidavit of illegality or issues joined as provided in the special assessment acts after the improvement has been completed and execution issued for the collection of the assessment against the property owner, has been repeatedly held as affording due process of law.

In the instant case the special assessment act so provided. It was the only course of procedure open to appellants. In the case at bar appellants adopted this course of procedure. They set up their defense in an action brought by the municipality to recover upon a special municipal paving execution. This was the sole and only opportunity given to appellants to be heard.

There can be and is no estoppel when appellants follow the only procedure which is open or permitted them under the statute in question. The Supreme Court of Georgia in holding that appellants were estopped from introducing evidence in the only proceeding open to them upon the question of their liability for the amount of the assessment made against them was and is a violation of the due process of law provision of the constitution of the United States.

The Georgia cases of estoppel cited by the Supreme Court of the State of Georgia in its decision place the estoppel not upon the reliance by the property owner upon the sole remedy afforded by the special assessment acts, but are

based upon the fact that in such a hearing it was established that the property owner had accepted benefits and failed to follow the procedure as provided in the act. In the instant case appellants were denied the right to show that they had received no benefits. Evidence of estoppel by the acceptance of benefits would be in rebuttal or in the nature of a replication to appellants' defense. The Supreme Court of Georgia rules out all evidence of defense and decides a case upon the basis of an estoppel. This is clearly a denial of due process of law.

Saunders v. Shaw, 244 U. S. 317.

(d). Estoppel may arise where a property owner accepts benefits and then undertakes to avoid payment therefor. In the case at bar appellants are denied the right to establish that they received no benefit whatever from the paving assessment in question.

No estoppel arises where the property or property owner is not benefited by the improvement.

O'Brien v. Wheelock, 184 U. S. 430.

Third: That the Georgia statutes in question, as construed and enforced against appellants in the decision rendered by the Supreme Court of Georgia on the 30th of September, 1935, were repugnant to the Fourteenth Amendment to the Constitution of the United States.

In its said decision the Supreme Court of the State of Georgia held that the special paving assessment statutes in question were local acts—amendments to the municipal charter of the City of Decatur. They were not general statutes; they were not amendments to the charters of private corporation, nor amendments to appellants' corpor-

ate charter. Cases dealing with general laws which are amendments to private charters or utility companies' charters are not in point.

The Supreme Court of Georgia in its decision rendered on September 30th, 1935, held that under the municipal charter amendments the City of Decatur "had legislative authority to pave its streets and to assess a portion of the cost of such improvement against the street railway company occupying and using, with the consent of the city, the street paved, irrespective of benefit to the company. This authority comes both within the taxing and police power reserved in the State."

The Supreme Court of the State of Georgia does not say whether the special paving assessment in question comes under the taxing power or under the police power.

In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 343,344 this Court held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or *other property specially benefited.*" (Italics ours.)

The construction placed upon said local assessment acts by the Supreme Court of the State of Georgia is that in order to sustain special assessments against certain property owners benefits must result from the improvement, whereas, as to other property owners, an assessment can be made "irrespective of benefits."

Such construction of said Acts renders them unconstitutional and violative of the equal protection of law provision of the Federal Constitution.

Street railway companies are entitled to the same constitutional protection and guarantee accorded to others.

44 Corpus Juris, "Municipal Corporations," page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri-Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340, 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably.

N. C. & St. L. Rwy. Co. v. Walters, 294 U. S. 405; 79 Law Ed. 458.

Under the due process of law clause of the Federal Constitution, property owners are entitled to a hearing as to whether a police regulation or requirement is legal. In the case at bar appellants were denied any hearing.

The construction put upon the special local assessment statutes in question by the Supreme Court of the State of Georgia, in its decision rendered on the 30th of September, 1935, renders the said statutes unconstitutional, for, as thus construed, appellants are denied the equal pro-

tection of the law and the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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